

In the Matter of)
)
A National Broadband Plan for Our Future) GN Docket No. 09-51

¹ *In the Matter of A National Broadband Plan for Our Future*, Notice of Inquiry, GN Docket No. 09-51, FCC 09-31 (released April 8, 2009) (“NOI”).

At the same time, however, our industry remains highly vulnerable to misuse of the Internet for online copyright infringement. As with other content industries, online piracy has plagued the entertainment software industry for years. For example, an analysis of P2P piracy of only thirteen game titles across two major P2P networks during December 2008 found over six million infringing game downloads of just those titles in over 200 countries and territories.² The combination of our industry's increasing migration to digital distribution mechanisms with this vulnerability to infringing activity on the Internet gives us a unique perspective and a vital interest in the Commission's recommendations for a national broadband plan.

While the NOI seeks comment on several issues that are of interest to the ESA, at this time, we are limiting our comments to the following central theme. Whatever recommendations the Commission makes, it should clarify that network operators will continue to have the legal right and ability to prevent and deter illegal activity, such as online copyright infringement, occurring on their networks.³

DISCUSSION

In fashioning its policies, the Commission should follow its established practices of distinguishing between lawful and unlawful content. The Commission's policies to spur broadband deployment should seek to avoid unintended consequences that might exacerbate unlawful copyright infringement or other illegal activity online. To do otherwise would be inconsistent with the Commission's *Internet Policy Statement* and established precedent requiring that the Commission respect the legal structures and policies established by Congress

² IIPA's 2009 Special 301 Report on Copyright Protection and Enforcement (Feb. 17, 2009), Cover Letter to U.S. Trade Representative at p. 5, <http://www.iipa.com/rbc/2009/2009SPEC301COVERLETTER.pdf>.

³ We confine our remarks to this specific issue and offer no view about the broader issues surrounding net neutrality.

in related areas of legislation.⁴ As the Commission recognized in its recent interpretation of the *Internet Policy Statement*, network providers, “consistent with federal policy, may block transmissions of illegal content (e.g., child pornography) or transmissions that violate copyright law.”⁵ The Commission should respect this principle by ensuring that its regulatory policies encourage lawful use, and discourage unlawful use, of broadband services, and remain consistent with the policy objectives of American copyright law.

Indeed, the Commission is obligated to consider and respect “other national purposes” (NOI ¶ 104), one of which is the importance of content and its protection to America’s competitiveness in the global economy. There is no doubt that the copyright industries form a vital part of America’s global competitiveness, and that entertainment software piracy poses a significant loss to the United States economy. As one Supreme Court justice so aptly characterized, the transfer of copyrighted files over the Internet via P2P applications is simply “garden variety theft.”⁶

Our legal system has never tolerated theft. Left unchecked, the spread of online piracy will continue to harm our industry and have a negative impact on our economy. It will also result in unnecessary, wasteful use of broadband access. New capacity will be consumed, in no small measure, by piratical uses, such as illegal P2P, streaming, and direct download links, absent reasonable steps to prevent and deter such activities. Unmanaged networks clogged with

⁴ See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCC Rcd 14986 (2005); see also e.g., *FCC v. RCA Communications, Inc.* 346 U.S. 86 (1953); *Storer Communications, Inc. v. FCC*, 736 F.2d 436, 443 (D.C. Cir. 1985).

⁵ See *Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd 13028, ¶ 50 (2008) (“Comcast Order”).

⁶ *MGM Studios, Inc. v. Grokster*, 545 U.S. 913, 961 (2005) (concurring opinion).

illegal content impair the broadband experience of others who make lawful use of online services. For example, one article noted that “it only takes about 10 BitTorrent users bartering files on a node (of around 500 [users]) to double the delays experienced by everyone else [on that node].”⁷

In the past, the Commission has recognized the tension between encouraging deployment of new technologies and discouraging use of those technologies for unlawful purposes.⁸ In light of this, at a minimum, the Commission should carefully consider any potential negative impact of its recommendations on the ability of copyright holders and network operators to deter online piracy or other illegal conduct to ensure no harm is done to American content businesses, which a national broadband strategy should be meant, in part, to foster. Also, the Commission should ensure that any “training” initiatives include education on lawful and unlawful uses of the Internet, promote lawful uses, and discourage unlawful uses.

Most important, the Commission’s national broadband plan should (1) give network operators sufficient regulatory flexibility to combat online piracy on their networks; and (2) include an explicit clarification, derived from the *Internet Policy Statement*, that network operators have the legal right to use reasonable network management techniques to combat online piracy.

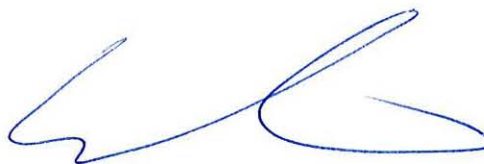
⁷ Leslie Ellis, *BitTorrent's Swarms Have a Deadly Bite on Broadband Nets*, Multichannel News, May 8, 2006, available at, <http://www.multichannel.com/article/CA6332098.html>.

⁸ See e.g. *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Further Notice of Proposed Rulemaking and Declaratory Ruling, 15 FCC Rcd. 18199, 18204 ¶ 15 (2000).

CONCLUSION

For the reasons discussed above, we recommend that the Commission explicitly clarify that network operators have the legal right to prevent and deter illegal activity, such as copyright infringement, occurring on their networks, and that they are encouraged to do so.

Respectfully submitted,

A handwritten signature in blue ink, consisting of a stylized 'K' followed by a series of loops and a final horizontal stroke.

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